85-1099

NO. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GLEN ADKINS,

Petitioner

v.

THE C. AND O. RAILWAY CO.
AND
W. T. BRADY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Is an intentional infliction of physical contact and emotional distress resulting in physical injury actionable under the Federal Employer's Liability Act?

2. Is a properly stated cause of action for intentional infliction of physical contact and emotional distress under the FELA barred or preempted by the Railway Labor Act when the actions of the defendant railroad are also the subject of a labor grievance?

THE PARTIES

The petitioner, Glen Adkins, is an employee of the

defendant C & O Railway Company and is a member of the Brotherhood of Railway and Steamship Clerks, Freighthandlers, Express and Station Employees, Black Diamond Lodge 1363. Respondent W. T. Brady, is a yardmaster in the employ of respondent C & O Railway Company and has been petitioner's supervisor at various times during petitioner's employment. Respondent C & O Railway Company is a corporation doing interstate business.

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IN THE

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GLEN ADKINS,

Petitioner,

v.

THE C & O RAILWAY CO.,
AND
W. T. BRADY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Glen Adkins, the petitioner herein, prays that a writ of certiorari issue to review the judgment of The United States Court of Appeals for the Fourth

Circuit entered in the above-entitled case on the third day of October, 1985.

OPINIONS BELOW

On October 3, 1985 the Opinion and Order of the Court of Appeals (Appendix p. 1a) was rendered, affirming the Opinion and Order of the District Court.

On February 11, 1985, District Judge Robert J. Staker filed a Memorandum Opinion and Order denying petitioner's motion for remand and granting respondent's motion for summary judgment. (Appendix p. 1b) Judgment for the respondents was entered the same day. It is from

these orders that the petitioner now seeks relief.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Federal Employer's Liability Act, 45 U.S.C. §51 et. seq. and the Railway Labor Act, 45 U.S.C. §151, et. seq.

STATEMENT OF THE CASE

This action was brought by the petitioner, Glen Adkins, seeking recovery of money damages from the respondent railroad and his supervisor, W. T. Brady, for physical contact and emotional

distress resulting in subsequent physical injuries after being harassed in the performance of his duties by his supervisor.

In his deposition, the petitioner testified that his supervisor, the respondent, W. T. Brady, had engaged in a course of conduct that included the petitioner being struck in the chest several times by weighbills thrown at him, being cursed, having the petitioner's work shoved off the petitioner's desk and into the floor, being ordered to run in front of moving trains and being told consistent lies about the petitioner to his supervisors.

The petitioner eventually developed physical problems including a spastic colon from the physical contact and harassment at work.

On September 23, 1983 petitioner filed suit in the Circuit Court of Logan County, West Virginia and service was accepted by the Secretary of State on behalf of respondent Chesapeake and Ohio Railway Company (hereinafter "C & O") on September 26, 1983.

On October 26, 1983, the C & O removed the action to the U. S. District Court for the Southern District of West Virginia alleging that the petitioner's complaint

arises under and is governed by the Railway Labor Act, 45 U.S.C. §151 et seq. (hereinafter "RLA") and that therefore the District Court had jurisdiction under 28 U.S.C. §1441. The petitioner filed a motion for remand alleging that the complaint arises not under the RLA but rather under the Federal Employers Liability Act, 45 U.S.C. §51 et seq. (hereinafter "FELA") and that therefore removal was impermissible under the provisions of 28 U.S.C. §1445. Respondent filed a motion for summary judgment which was granted by the District Court.

The complaint alleges that "as a result of continued willful,

malicious and intentional harassment on the part of the defendant, W. T. Brady, an agent and employee of the defendant railroad acting within the scope of his employment that he [petitioner] was caused to suffer a spastic colon as a result of the emotional stress resultant from the aforesaid wrongs."

The complaint also alleges that respondent C & O knew or should have known of Brady's actions and failed to curtail the same. In addition, the complaint alleges that C & O "knowingly and intentionally failed to provide this plaintiff with a safe place to work" in violation of the FELA.

On October 3, 1985 the Circuit Court affirmed the order of the District Court denying the petitioner's motion for remand and granting respondent's motion for summary judgment.

REASONS FOR GRANTING THE WRIT

I.

AN INTENTIONAL INFLICTION OF PHYSICAL CONTACT AND EMOTIONAL DISTRESS RESULTING IN PHYSICAL INJURY IS ACTIONABLE UNDER THE FEDERAL EMPLOYER'S LIABILITY ACT.

The authority that the employer's duty under the FELA is not limited to the circumstances involving just physical defects, is set forth in the following manner: 'First, it may be observed under controlling federal

law the rule which requires a railroad to furnish its employees with a reasonably safe place to work refers not only to the physical condition of the place itself but may include negligent acts of fellow employees." Rediker v. Chicago, Rock Island & Pacific Railroad, 1 Kan. App.2d 581, 571 P.2d 70, 73 (1977), cert. denied, 435 US 982 (1978).

The alleged negligence in Rediker was the inattentiveness of the engineer who allowed a sudden and unusual movement of cars in which the plaintiff was working. Similarly, the court in Denny v. Montour Railroad, 101 F. Supp. 735 (W.D. Pa. 1951), recognized that

employee negligence may trigger liability where an engineer failed to promptly stop a train on receiving the plaintiff brakeman's signal.

There is ample precedent for the proposition that a carrier's duty to provide a safe place to work may extend to prevention of intentional assaults or criminal acts by fellow employees. The controlling principles in this area have been stated as follows:

> A long line of decisions under the FELA deal with the carrier's duty to render its employee's working places safe from the intentional assaults or criminal acts of fellow employees. These decisions establish the principal that the master is liable for such conduct only when it employees acted within the scope of their

employment and in furtherance of the employer's business. Under this theory, liability of the master is vicarious in that the negligence of the offender must be imputed to the employer under the doctrine of respondeat superior. The decisions supporting this view have relied principally upon the leading decision of Davis v. Green which involved the wanton and wilful killing of an employee by a fellow worker. A judgment for the plaintiff was reversed by the Supreme Court and Mr. Justice Holmes, speaking for the court, said:

> The ground on which the Railroad Company was held was that it had negligently employed a dangerous man with notice of his characteristics, and that the killing occurred in the course of the engineer's employment. But neither allegations nor proof present the killing as done to further the master's business, or as anything but a wanton and wilful act done to satisfy the temper or spite of the engineer.

> Whatever may be the law in Mississippi, a railroad company is not liable for such an act under the statutes of the United States. The only sense in which the engineer was acting in the course of his employment was that he had received an order from Green which it was his duty to obey--in other words that he did a wilful act wholly outside the scope of his employment while his employment was going on.

17 Ohio St. L. J., supra, at 377-78 (citing Atlantic Coast Line Railroad v. Southwell, 275 U.S. 64 (1927); Hoyt v. Thompson, 174 F.2d 284 (7th Cir. 1949); Sheaf v. Minneapolis, St. Paul & Sault St. Marie Railroad, 162 F.2d 110 (8th Cir. 1947); Lannes v. Atchison, Topeka & Sante Fe Railroad, 344

Ill. App. 123, 99 N.E.2d 705 (1951); Young v. New York Central Railroad, 88 Ohio App. 352, 88 N.E.2d 220 (1949), cert. denied, 339 U.S. 986 (1950); Zoccano v. Long Island Railroad, 298 N.Y. 553, 81 N.E.2d 96 (1948); Osment v. Pitcairin, 349 Mo. 137, 159 S.W.2d 666 (1941), cert. denied, 320 U.S. 792 (1943); Davis v. Green, 260 U.S. 349 (1922).

In Harrison v. Missouri Pacific R. Co., 372 U.S.248 (1963), per curiam, a railroad foreman brought an FELA action as a result of being assaulted by a member of his crew. Disputed testimony was to the effect that the plaintiff's superiors were

aware of the violent nature of the assailant. After a jury verdict in favor of the plaintiff, the trial court set aside the verdict. In reversing, the Supreme Court found the testimony sufficient to support the jury's finding of reasonable foreseeability of harm, and that the lower courts had improperly invaded the function and province of the jury.

Liability was rejected in Sheaf v. Minneapolis, St. Paul & Sault St. Marie Railroad, supra, 162 F.2d 100, where the plaintiff alleged injuries as a result of an unprovoked attack by a fellow employee, known to be quarrelsome and vicious for many years. This

result was apparently based upon the reasoning that the unprovoked attack was outside the scope of employment. See also Tatham v. Wabash Railroad, 412 Ill. 568, 107 N.E.2d 735 (1952) (assault by fellow employee was outside the scope of employment so that employer was not liable on respondeat superior grounds, although the employer may be directly liable for negligence in not protecting an employee from foreseeable harm from fellow employees). The present matter is distinguishable from Tatham in that the verbal and physical harassment of the employee by his supervisor was within the normal

scope of employment.

Another analogous case is Lillie v. Thompson, 173 F.2d 481 (6th Cir. 1949), where a railroad company was held liable to a female employee for an attack by a third party. There was ample evidence that the place of work, a remote building in a dangerous area, was frequented by hoboes, thieves and other trespassers. Since the employer had knowledge or reason to know of the risk of intentional harm by third parties, it was liable for its negligence in failing to provide a safe place to work.

Under the foregoing authority, the railroad was

negligent in hiring the supervisor and not preventing or stopping his harassment of the petitioner. The railroad knew the harassing conduct and the risk to the petitioner's health, therefore liability was properly established under the FELA for failure to provide a safe place to work.

II.

A PROPERLY STATED CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF PHYSICAL CONTACT AND EMOTIONAL DISTRESS UNDER THE FELA IS NOT BARRED OR PREEMPTED BY THE RAILWAY LABOR ACT WHEN THE ACTIONS OF THE RESPONDENT RAILROAD ARE ALSO THE SUBJECT OF A LABOR GRIEVANCE

Assuming the petitioner to have a viable cause of action under the FELA certianly it was

not the intent of Congress to bar a railroad worker's rightful compensation for injuries in an effort to avoid possible conflict with the grievance procedure of the RLA.

The petitioner recognizes there to be a number of decisions finding tort claims by railroad workers to be barred by the RLA.

The Ninth Circuit in Magnuson v. Burlington Northern, Inc., 576 F.2d 1367 (9th Cir.), cert. denied 439 U.S. 930 (1978), found the plaintiff railroad worker to not have a cause of action for wrongful discharge and resulting emotional damages. However, the rights the plaintiff claimed to

have violated were those guaranteed to him under the labor contract and his alleged emotional damages did not arise from the performance of duties for the railroad. The Ninth Circuit addressed a similiar situation in Beers v. Southern Pacific Transportation Company, 703 F.2d 425 (1983), where the plaintiff complained of injuries suffered as a result of harassment over union representation. Had these workers in Magnuson and Beers suffered emotional damages from the performance of their duties for the railroad they presumably would have brought FELA actions and not the state tort claims they

attempted.

The district court, in the present case, relied upon an unpublished Sixth Circuit Court of Appeals ruling in Antalek v. Norfolk & Western Ry. Co., No. 82-427 (N.D. Ohio, December 28, 1983,) affirmed No. 84-3057 (6th Cir. August 30, 1984).

In Antalek, the Sixth Circuit was faced with basically the same issues as in the present case. The plaintiff Antalek alleged that his supervisors, with the knowledge of railroad management, engaged in a course of harassment, intimidation, and conspiracy to terminate Antalek's employment. After carefully reviewing the ties

that Antalek's tort action had with a pending grievance, the Sixth Circuit found Antalek's claims "inextricably interwined with the grievance machinery of the collective bargaining agreement and of the RLA" and cited Magnuson, supra, in support as well as Beers, supra, and dismissed the plaintiff's action.

The Antalek court was faced with what the petitioner herein maintains is the real crux of these type actions, i.e. if the petitioner does have a viable claim under the FELA then the RLA would not bar the claim. Therefore, the Antalek court concluded "that the tort of

emotional distress is not actionable under the FELA", and found this tort to not be contemplated by the line of cases which allow recovery under the FELA for intentional torts citing Jamison v. Encarnaction, 281 U.S. 635 (1930); Harrison v. Missouri Pacific Railroad, 372 U.S. 248 (1963), per curiam; and Brooks v. Washington Terminal Co., 593 F.2d 1285 (D.C. Cir.), cert. denied, 442 U.S. 910 (1979).

Had the Sixth Circuit found the cause of action for emotional distress to be actionable under the FELA it would appear that Antalek would have had a different outcome.

It is submitted that the Sixth Circuit reached the wrong decision in Antalek although properly recognizing the problem, i.e. that a determination of the worker's claim under the FELA must be made. Other reported decisions have generally dealt with claims such as a worker maintaining he suffered emotional distress from violation of employment rights guaranteed to him by the labor contract, Magnuson, supra; or from emotional injury from harassment over union representation and discharge, Beers, supra.

In the present case, the District Court also relied upon Buell v. Atchinson, Topeka and

Santa Fe Ry., No. S-82-776 RAR (E.D. Calif. July 12, 1984). The plaintiff, Buell, sought damages under the FELA for a mental breakdown which he alleged to be caused by his supervisor and co-employees. Plaintiff sought to hold the railway liable for its alleged failure to take appropriate disciplinary measures against his antagonists. The railway moved for summary judgment. The court ruled that the wrongdoing alleged by plaintiff related directly to the employer-employee relationship. Finding the injury had its genesis in a labor problem which constitutes a minor dispute within

the meaning of the RLA, the court granted defendant's motion for summary judgment stating:

> "Plaintiff's injury flows directly from defendant's alleged failure to take appropriate disciplinary measures with regard to alleged misconduct by plaintiff's supervisor and several of his co-workers. This type of wrongdoing in Magnuson and the failure to conduct a full and fair investigation in Beers, is directly related to the employer-employee relationship. Plaintiff has never suggested that he could not have invoked the grievance procedures contained in the collective bargaining agreement to address the harassment he was suffering. On the contrary, the fact that union representatives did submit a written grievance with regard to the perceived harassment by ... indicates that the grievance procedures did apply to this type of dispute."

It is submitted that the district court in Buell erred in

reaching its conclusion. The court failed to consider the many situations where an occurrence which gave rise to an injury, such as a derailment, results in an FELA action at the same time the railroad attempts to discipline the worker for causing the accident which leads to a grievance. Even the railroads would not argue that simply because the subject matter of such an FELA action was also subject of a grievance that the FELA action be barred.

In Cales v. Chesapeake & Ohio Ry. Co., 300 F.Supp. 155 (W.D. Va. 1969) the district court found a false imprisonment actionable

under the FELA noting that any intentional tort which inflicts bodily injury is negligence within the meaning of the FELA.

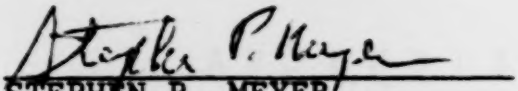
The proper matters for consideration should be from what source the injured railroad worker's emotional damages flowed. If from distress over job rights, such claims might properly be barred; however, if the distress is inflicted in the actual performance of duties for the railroad, as in the present case, the action should be allowed to be maintained.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of

certiorari be granted to review the judgment of the Circuit Court. In the event that the petition is granted, petitioner prays that the judgment of the Court below be reversed and the cause be remanded.

Respectfully submitted,



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A P P E N D I X

(UNPUBLISHED)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-1204

Glen Adkins,

Appellant,

versus

The Chesapeake and Ohio Railway Company, a foreign corporation and W. T. Brady,

Appellees.

Appeal from the United States District Court for the Southern District of West Virginia, At Huntington.
Robert J. Staker, District Judge.
(C/A 83-3488)

Argued: July 15, 1985.
Decided: October 3, 1985.

Before
RUSSELL, SPROUSE
and
WILKINSON,
Circuit Judges

Paul Perfater (Stephen P. Meyer, Meyer and Perfater on brief) for Appellant; Barbara Lee Ayres (William C. Beatty; Huddleston, Bolen, Beatty, Porter & Copen on brief) for Appellees.

PER CURIAM:

In this civil action, appellant Glen Adkins seeks to recover from appellees Chesapeake and Ohio Railway Company and W. T. Brady damages for intentional infliction of emotional distress for injuries and distress suffered by appellant while in the employ

of the railroad and while under the supervision of Mr. Brady. After a review of the record, consideration of the briefs, and following oral argument, we find that the district court properly held that appellant's claim arises under the exclusive jurisdiction of the Railway Labor Act, 45 U.S.C. §§151-188 (1983), and is one that is subject exclusively to the administrative process of the Railway Labor Act. Accordingly, we affirm on the opinion of the district court. Adkins v. Chesapeake and Ohio Railway Co., C/A No. 83-3488 (S.D.W.Va. Feb. 11, 1985).

(UNPUBLISHED)

UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF
WEST VIRGINIA
AT HUNTINGTON.

GLEN ADKINS,

Plaintiff,

v. CIVIL ACTION NO. 83-3488

THE CHESAPEAKE AND OHIO
RAILWAY COMPANY, a foreign
corporation, and W. T. BRADY,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff Glen Adkins is an employee of defendant Chesapeake and Ohio Railway Company (C&O) who seeks to recover damages for mental distress and a spastic colon allegedly caused by the harassment of his supervisor at work, defendant W. T. Brady, whose

conduct the plaintiff further alleges was known or should have been known to C&O. Plaintiff brought an action in the Circuit Court of Logan County, West Virginia, against C&O and Brady pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. §51. Plaintiff alleges that C&O violated the FELA by failing to provide him a safe place to work. Defendants removed the action to this court invoking jurisdiction under the Railway Labor Act (RLA), 45 U.S.C. §151.

Plaintiff has moved to remand the action to state court on grounds that removal of a FELA action is precluded by 28 U.S.C.

§1445(a) which provides: "A civil action in any state court against a railroad or its receivers or trustees, arising under sections 51 to 60 of Title 45, may not be removed to any district court of the United States." Defendants, on the other hand, contend that this action arises under the RLA and not the FELA and that plaintiff's exclusive remedy under the RLA is the grievance and arbitration process. Plaintiff has filed a grievance which remains in arbitration. Defendants move for summary judgment on these grounds. The court denies plaintiff's motion to remand and grants summary judgment

in favor of defendants.

Defendants have supplied the court and opposing counsel copies of three recent decisions all of which hold that claims like those sought to be asserted by the plaintiff herein do not arise under the FELA but are within the exclusive province of the RLA. In Antalek v. Norfolk & Western Ry. Co., No. 82-427 (N.D. Ohio December 28, 1983), affirmed, No. 84-3057 (6th Cir. Aug. 30, 1984)(unpublished order) plaintiff brought suit under the FELA alleging that harassment by railway foremen and supervisors had caused him mental anguish, emotional distress and physical

injuries requiring hospitalization. The railway moved to dismiss the complaint on grounds that plaintiff's claim was for wrongful discharge and within the exclusive jurisdiction of the RLA. The court held that the gravamen of the plaintiff's complaint, the tort of intentional infliction of emotional harm, was not actionable under the FELA and accordingly dismissed plaintiff's FELA claim.

In Scales v. National Railroad Passenger Corp., No. 84-0540 (E.D. Pa. April 23, 1984), plaintiff brought suit under the FELA in state court against the railroad and his former supervisor

alleging intentional and negligent infliction of emotional distress caused by harassment in connection with baseless disciplinary proceedings. Defendants removed the action to federal court asserting original jurisdiction under the RLA. Plaintiff moved to remand to state court. The court denied the motion to remand ruling that plaintiff's claims of harassment were within the exclusive province of the RLA.

And in Buell v. Atchison, Topeka and Santa Fe Ry. Co., No. S-82-776 RAR (E.D. Calif. July 12, 1984), plaintiff sought damages under the FELA for a mental breakdown which he alleged to be

caused by his supervisor and co-employees. Plaintiff sought to hold the railway liable for its alleged failure to take appropriate disciplinary measures against his antagonists. The railway moved for summary judgment. The court ruled that the wrongdoing alleged by plaintiff related directly to the employer-employee relationship. Because the injury had its genesis in a labor problem which constitutes a minor dispute within the meaning of the RLA, the court granted defendant's motion for summary judgment.

In light of this precedent, the court holds that plaintiff's

claims for mental distress and colitis arising from the alleged harassment by his supervisor are directly related to the employer-employee relationship and are within the exclusive province of the RLA. See also Beers v. Southern Pacific Transportation Co., 703 F.2d 425 (9th Cir. 1983); Magnuson v. Burlington Norther, Inc., 576 F.2d 1367 (9th Cir. 1978). Accordingly, plaintiff's exclusive remedy lies within the administrative process of the RLA. See Andrews v. Louisville & Nashville Railroad Co., 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972).

For the foregoing reasons, it

is hereby ORDERED that the motion of the plaintiff to remand this action to the Circuit Court of Logan County, West Virginia, be, and the same hereby is, DENIED and OVERRULED. It is further ORDERED that the motion of the defendants for summary judgment be, and the same hereby is, SUSTAINED.

The clerk of the court is directed to mail a certified copy of this order to all counsel of record.

CERTIFICATE

In accordance with Rule 21 of the Rules of the Supreme Court of the United States, I hereby certify that I have this 24th day of December, 1985 mailed the required copies of the Petition for Certiorari to the Clerk's Office of the Supreme Court of the United States for the purpose of filing on December 24th, 1985, and have also mailed the required copies of the above mentioned documents to all attorneys of record as follows:

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Taken, subscribed and sworn to before me this 20th day of December, 1985.

My commission expires April 19, 1993.

Barbara McCallister
NOTARY PUBLIC